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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 306

LOCAL UNION NO. 12, PROGRESSIVE MINE WORKERS OF AMERICA, DISTRICT 1,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, AND RAWALT COAL COMPANY, A CORPORATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Local Union No. 12, Progressive Mine Workers of America, District No. 1, by A. M. Fitzgerald and G. W. Horsley, its attorneys, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Statement of the Matter Involved

The Petitioner, Local Union No. 12, Progressive Mine Workers of America, District No. 1 (hereinafter referred to as the Union) filed an unfair labor charge on July 18,

1949 and an amended charge May 15, 1950 against the respondent, Rawalt Coal Company (hereinafter referred to as the Company). (App. 1-5.) This charge docketed as Case 13-CA-310, alleged that the respondent Company was engaged in unfair labor practices within the meaning of Section 8 (a) 1, (3), (4), and (5) of the National Labor Relations Act as amended. An unfair labor practice complaint based upon these charges was issued on May 22, 1950 by the General Counsel of the National Labor Relations Board, (hereafter referred to as The Board). (App. 5-9.)

The substance of the complaint was that about May 23, 1949, all of the employees of the Company, who were members of the Union were locked out by said Company and the Company refused to negotiate for any contract and discriminated against said employees because of their union affiliation. The Company in substance denied all of the allegations of the complaint including the allegation that the alleged unfair labor practices of the Company affected Commerce within the meaning of Section 2 (6) and Section 2 (7) of the Act.

On June 13th and 14th, 1950, a hearing was held upon the matters alleged in said complaint. The trial examiner issued his intermediate report on August 31, 1950. (App. 63-92.) In this report the trial examiner made findings in part:

> "Rewalt Coal Company is an Illinois corporation, engaged in mining and selling coal near Canton, Illinois. During the period September 1, 1948, to August 31, 1949, Respondent produced approximately 30,000 tons of coal and sold approximately 9,000 tons thereof to the Illinois Coal and Dock Company. Of the amount so purchased by the latter company, approximately 2,500 tons were sold by it to the Toledo, Peoria and

> Western Railroad, an interstate common carrier. The remainder of the coal so purchased by the Illinois Coal and Dock Company was sold to the Commercial Solvents Corporation, whom the Board in November, 1948 found to be engaged in commerce within the meaning of the Act, the Central Illinois Light Company of Peoria, and other industrial and domestic consumers. I find that Respondent is engaged in commerce within the meaning of the Act."

Furthermore, the trial examiner concluded as a matter of law, that the Company had committed unfair labor practices in violation of Section 8 (a), (1), (3) and (4) of the Act; but had not refused to bargain with the Union in violation of Section 8 (a) (5) and specifically stated that the aforesaid unfair labor practices were unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act. Both the Union and the Company filed exceptions to the trial examiner's intermediate report.

Meanwhile, on October 3, 1950, the National Labor Relations Board had adopted certain minimum standards which had to be met before the Board would assert jurisdiction in any unfair labor practice case. The standard which the Board had adopted, by virtue of its decision enunciated in the Hollow Tree Lumber Company, 91 N.L.R.B. 113, and, which was the basis for its refusal to assert jurisdiction in the instant case, was:

> "The Board has determined that it will exercise jurisdiction over those enterprises which affect commerce by virtue of the fact that they furnish goods or services necessary to the operations of other employers engaged in commerce, *without regard to other factors,* (italics ours) where such goods or services are valued at $50,000 per annum or more, and are sold to: (a) public utilities or transit systems; (b) companies which function as instrumentalities and channels of interstate

> and foreign commerce and their essential links; or (c) enterprises engaged in producing or handling goods destined for out-of-State shipment, or performing services outside the State in the value of $25,000 per annum or more. This standard reflects, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues."

On November 14, 1950, the Board ordered the complaint dismissed, saying:

> "On these facts we find, in agreement with the Trial Examiner, that the Respondent's operations affect commerce within the meaning of the Act. However, as all its coal was sold locally and the value of its sales to interstate firms over which we would assert jurisdiction was less than $50,000, we find, in accord with our announced policy, that it would not effectuate the policies of the Act to assert jurisdiction in this case. We shall, therefore, dismiss the complaint in its entirety."

Thereafter, the Union filed a petition to review and set aside this order of the Board with the United States Court of Appeals for the Seventh Circuit. That Court, on May 23, 1951, dismissed the petition for review and after a petition for rehearing was duly filed by the Union, denied the same on June 11, 1951. On June 20, the Court of Appeals issued an order staying the issuance of the certified copy of the final order of that Court to the National Labor Relations Board for a period of thirty days and on July 27, 1951 a further stay was granted until September 10, 1951 to allow the petitioner time to present a petition for certiorari to this court.

The Court Has Jurisdiction

In this petition, the petitioner submits that there are several questions which it is presenting and which should

be persuasive upon the sound judicial discretion of this court to allow a writ of certiorari.

The instant case involves an important question of federal law which has not been, but should be, settled by this court.

Petitioner contends that the Circuit Court of Appeals for the 7th Circuit has decided an important question of federal law in conflict with applicable decisions by this court and in conflict with applicable decisions of other Circuit Courts of Appeal.

The instant case also involves the decision of a matter squarely contrary to the intent of Congress in the passage of the National Labor Relations Act.

Questions Presented

1. Can the Labor Board nullify the clear intention of Congress by adopting jurisdictional rules and regulations based upon arbitrary dollar values and use those in defining what affects interstate commerce without regard to the true facts and circumstances then in existence?

2. Can a Respondent Company arbitrarily cut its production so as to evade the restrictions of the Act?

3. The Board erred in dismissing the complaint, for once having evoked its jurisdiction it cannot arbitrarily withdraw that jurisdiction.

4. The Board erred in dismissing the complaint for the reason that even under the facts as contained in the record the volume of interstate business done by Rawalt exceeds the arbitrary jurisdictional amount adopted by the Board.

5. Assuming that the Board has the power to adopt such

rules and regulations, can they be made retroactive so as to change the outcome of a hearing after the evidence has been completed and the trial examiner's intermediate report issued?

Reasons Relied Upon for Allowance of Writ

This case can be boiled down to a few essential facts. A more detailed statement of the facts involved will be found in the Brief attached hereto. The Labor Board had its investigators check into all of the facts and circumstances, and after several months of investigating, caused an unfair labor complaint to be issued in which it alleged the very facts that were proven by the evidence as shown by paragraph two of said complaint, (App. 6) and then concluded that the Respondent was engaged in operations which affected commerce within the meaning of the Act.

The trial examiner in his intermediate report found as a conclusion of law that the unfair labor practices perpetrated by the company were unfair labor practices within the meaning of Section 2 (6) and (7) of the Act and that the Company's operations affected commerce within the meaning of these provisions of the Act. The National Labor Relations Board in its decision did not dispute this finding of the trial examiner but specifically agreed that the Company's operations did affect commerce within the meaning of the Act. However, the Board concluded that it would not assert jurisdiction in the case since the Company had sold all its coal locally and the value of its sales to interstate firms, over which the Board would assert jurisdiction was less than $50,000.00. In other words, the Board considered only whether or not the operations of the Company met this arbitrary dollar and cents figure of $50,000.00

in sales, and because it had not, the Board refused to retain jurisdiction, regardless of other facts and circumstances.

When the case was heard by the Court of Appeals for the Seventh Circuit, that Court side stepped the issue entirely by making no finding in its decision, except perhaps by implication, that the Board had the power under the Act, as written, to set up minimum jurisdictional standards. In its opinion the Court cited the case of the Consolidated Edison Company v. National Labor Relations Board 305 U. S. 197, 223-224, which case specifically held that in determining whether alleged unfair labor practices affect interstate commerce, consideration should be given to all the existing circumstances. In other words, the matter should be decided on a case to case basis. Furthermore, the Court said in its opinion in the instant case "in view of the facts in this case" it felt that the Board had the power to dismiss the proceeding on the ground that the impact on Commerce was not substantial enough to warrant the exercise of jurisdiction. The only mention of the minimum standards which were set up by the Board was where the Court discussed whether or not the standards were retroactively applied in this case. There the Court made only the statement that the petitioner had no legal recognizable right in any particular board jurisdictional policy.

The Court cited no authority for the setting up of these standards, and for good reason, because there is no statutory provision allowing such action, nor is there any decision of this court or any court of Appeals where this question has been directly decided. It is clear from a reading of the statute, and the amendment to it, that the Board was nowhere given authority to completely disregard the

large body of case law which had accumulated under the Act in which this jurisdictional question was decided on the facts in each case without reference to any arbitrary jurisdictional standard. Certainly, it is, and the Courts have consistently interpreted it to be, the intent of Congress that this jurisdictional question is to be decided on the facts in each case.

In 1943 the Board asserted jurisdiction in the case of Board v. Stremel, d. b. a. Crow Bar Coal Co., 48 N.L.R.B. 660, which position was affirmed by the Circuit Court of Appeals, 10th Circuit, 141 Fed. 2d 317. This case was relied upon by the trial examiner in his intermediate report (see footnote—App. 65) as a result of the admonition of the General Counsel for the Board in his brief filed with the trial examiner. In that case (dollar amounts are not mentioned) apparently only a few coal miners were involved with a small mine in Colorado that sold 20% of its coal to a railroad, as compared with 30% in the instant case. The Board asserted that this was sufficient to give them jurisdiction, which was affirmed by the Circuit Court of Appeals and is exactly contrary to the holding in the instant case.

The Board and the Court have both failed to consider the circumstances in the instant case, in that the coal mine involved is a part of the overall coal production picture in the nation. The miners involved belong to a union which bargains for large mines as well as small mines and, as shown by the contract in evidence, wage scales are fixed for all miners in the State of Illinois and the operators of all of these mines pay into a general welfare fund which is administered for and on behalf of all of the miners in the State of Illinois and their dependents. Local Union No. 12 has made all filings with the Board and with the Department of

Labor as required by the Act, and has been recognized by the Board at all times as being subject to its jurisdiction.

These jurisdictional standards of the Board were set up after the trial examiner had made his intermediate report in this case, finding that the company's operations affected commerce within the meaning of the Act. The case went before the National Labor Relations Board, which Board in the interim between the time of the trial examiner's intermediate report and its own consideration of the case had adopted these jurisdictional standards, and in applying these standards dismissed the complaint. It is obvious that the petitioner had no opportunity to present any evidence to meet this specific jurisdiction standard, even if it were validly adopted. The petitioner had done all it was required to do by showing that the operations of the Company affected commerce within the meaning of the Act. Certainly, if the petitioner had known that this specific standard had to be met, it could have offered more evidence on the jurisdictional question. Even the National Labor Relations Board in its decision noted that some of the coal produced by the Respondent was shipped from Canton by rail; but that the record did not reflect the destination of these shipments. Undoubtedly, the petitioner could have amplified the evidence on this question if it had known that this standard was to be applied.

It is the contention of petitioner that the application of the minimum standard to the instant case, after the evidence had been taken and heard, was to apply such standard retroactively, to the prejudice of the rights of the petitioner and of the public; that even if the Board had the power to adopt such minimum standard, which is denied by petitioner, the Board had no power to apply such stand-

ard retroactively to pending cases which had been closed except for the decision of the Board.

WHEREFORE, for the reasons hereinabove stated, petitioner respectfully asks this honorable Court to grant a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit and that upon a hearing of this matter the decision and order of the Labor Board dismissing the unfair labor complaint be set aside and said Board ordered to proceed in determining the issues involved under its jurisdiction, or, in the alternative, that said Board be ordered to reopen the matter and proceed in the taking of further evidence and again reviewing the jurisdictional question upon all of the facts and circumstances involved, without regard to any minimum standard.

Petitioner's brief is annexed hereto as a part of this petition for writ of certiorari.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

LOCAL UNION NO. 12, PROGRESSIVE MINE WORKERS OF AMERICA, DISTRICT 1,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, AND RAWALT COAL COMPANY, A CORPORATION,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 189 Fed. (2d) 1. The opinion is also printed in full in the Transcript of Record at page....

Jurisdiction

The jurisdiction of this court is invoked under Section 1254 of Title 28 U. S. C. As was pointed out in the petition for writ of certiorari, ante, this court is urged to take jurisdiction of this matter for the reason than an important question of Federal law has not been, but should be settled by this court. It is submitted that the questions presented in this case are of fundamental importance in the administration of the National Labor Relations Act. The Board has adopted a set of minimum standards which petitioner

contends is contrary to the intent of Congress. The Court of Appeals for the Seventh Circuit has by implication approved this action, although we believe this decision is contrary to and in conflict with applicable decisions of other Circuit Courts of Appeal and of this Court.

Because of the concise language of the decision of the Board to the effect that the Company's operations did affect commerce within the meaning of the Act but because of the adoption of its minimum standard it could not retain jurisdiction, the issue is clear cut and squarely presented.

STATEMENT OF THE CASE

A rather complete statement of the procedural aspects of the case was set forth in our peition for certiorari. The Rawalt Coal Company has been in the production of coal at its slope mine near Canton, Illinois since about 1923. Its coal is transported from the mine by its own trucks, those of independent truckers, and various industrial and domestic consumers.

The Progressive Miners, the petitioning Union, has been an exclusive bargaining agent of Respondent's employees since about 1945.

About May 23, 1949, the employees were locked out. The Company refused to negotiate for any contract, and discriminated against said employees because of their Union affiliation.

The General Counsel authorized the issuance of an unfair labor complaint by the Labor Board against Rawalt, accusing Rawalt of unfair labor practice by its refusing to bargain collectively with the Union and of locking out its employees and refusing to reinstate said employees for the reason that said employees refused to cause to be with-

drawn charges of unfair labor practice; said complaint then recited that Respondent had discriminated against such employees within the meaning of Section 8(a) (3), 8(a) (4) and 8(a) (5) and had interfered with, restrained and coerced its employees in the exercise of their rights as guaranteed by Section 8(a) (1); that the acts of Respondent have a gross, intermediate and substantial relation to trade, traffic, and commerce.

Rawalt in substance denied all of the allegations of the complaint. Upon the hearing of this matter the trial examiner issued his intermediate report in which he found substantially that Rawalt had been guilty of unfair labor practices. The trial examiner specifically found that during the period, September 1, 1948 to August 31, 1949, Rawalt produced approximately thirty thousand tons of coal, nine thousand tons thereof being sold to the Illinois Coal and Dock Company, of which approximately twenty five hundred tons were sold by said Dock Company to the Toledo, Peoria and Western Railroad, an interstate common carrier, and the balance of to-wit, sixty five hundred tons, was sold to the Commercial Solvents Corporation, whom the Board in November of 1948 found to be engaged in interstate commerce, and also the Central Illinois Light Company of Peoria and other industrial consumers. The conclusion of the trial examiner was to the effect that Rawalt was engaged in commerce within the meaning of the Act.

The report of the trial examiner was dated August 31, 1950 and on November 14, 1950, the Board dismissed the complaint, saying: "On these facts we find, in agreement with the trial examiner, that the Respondent's operations affect commerce within the meaning of the Act. However,

as all of its coal was sold locally and the value of its sales to interstate firms over which we would assert jurisdiction was less than $50,000, we find, in accord with our announced policy, that it would not effectuate the policies of the Act to assert jurisdiction in this case. We shall, therefore, dismiss the complaint in its entirety." (App. 93.)

The Board further said: "However, since the issuance of the intermediate report in this case, the Board has adopted certain minimum requirements for the assertion of its jurisdiction. It therefore, becomes necessary for us first to examine the commerce facts in order to ascertain whether these minimum requirements had been met."

It will be noted that the Board had delegated its power to three members of the Board, who made the above decision.

Since the only question before this court is whether or not interstate commerce is involved, for the reason that no cross appeal has been filed, we confine the statement of facts to those portions of the evidence only, bearing upon the question of interstate commerce. We presume that if this court reverses the order of the Board it will then be remanded to the Board for further proceedings to determine whether or not it concurs in the findings of the trial examiner with regard to the existence or non-existence of acts of discrimination on the part of Rawalt.

Briefly, the facts bearing upon the question of interstate commerce are as follows:

It was stipulated that the mine was not on a railroad and that between September 1, 1948 and August 31, 1949 Rawalt sold approximately nine thousand tons of coal OR MORE to the Illinois Coal and Dock Company.

"Mr. Scott (Attorney for Rawalt): . . . and by reason of a railroad buying coal from them, some of their coal sold to the Illinois Coal and Dock Company, and approximately twenty five hundred tons sold to the Toledo, Peoria and Western Railroad: that the Rawalt Coal Company sold coal to said Illinois Coal and Dock Company, which was sold by them to the Commercial Solvents Corporation in the amount of approximately five hundred tons. That from May 27, 1949 to June 30, 1949 the Commercial Solvents Corporation paid directly to Rawalt for 428.3 tons of coal, which was sold by the said Rawalt through the Illinois Coal and Dock Company. (App. 22-23.)

Respondent Rawalt's Exhibit 2 showed the monthly production of coal and the average cost per ton per month as follows: (App. 26-27.)

Month	Tons Mined	Average Cost Per Ton
Sept. 1948	2635	3.66
Oct. 1948	2683	3.78
Nov. 1948	2547	3.12
Dec. 1948	2759	3.78
Jan. 1949	2103	3.73
Feb. 1949	2135	3.76
March 1949	2521	3.79
April 1949	814	4.62
May and June 1949	2462	3.12
July and August 1949	2154	3.32

Said Rawalt's Exhibit 2 showed 11,104 tons of coal delivered to Illinois Coal and Dock Company during said twelve month period. The sales price of such coal was $36,123.51. (App. 27-32.)

Rawalt's Exhibit 3 showed gross sales for the year 1949

of $78,765.64 (the Union employees did not work after May 23, 1949). (App. 34.)

During the period in July and into the Fall of 1949 the United Mine Workers (which union also represents a large number of coal miners in the State of Illinois, and which is a rival union to the Progressive Mine Workers of America) were on Strike part of the time and had an enforced work week of three days during a portion of the time, which resulted in a large demand for coal. During that time the price of coal fluctuated from $7.00 to $22.00 per ton. (App. 37-40.) Throughout this particular area the price of coal went up to about $10.00 per ton at the mine.

A further stipulation was entered into between Rawalt and the General Counsel to the effect that the Illinois Coal and Dock Company is purchasing coal from the Respondent and reselling that coal to the Toledo, Peoria and Western Railroad and other railroads, to the Central Illinois Light Company of Peoria and the Commercial Solvents Corporation at Peoria, and other industrial consumers and to domestic consumers. (App. 43.)

Adam Baxter, an officer of Rawalt, testified that prior to April, 1949 they had had nineteen employees, eleven of whom were Union members, but thereafter they operated with only eight non-union employees. Mr. Baxter admitted that while the United Mine Workers were on strike and on the enforced three day work week they could have sold all of the coal that they could have mined.

He identified the above mentioned exhibits and for example, during the month of September, 1948, said they produced 2635 tons of which 1300 tons were sold to the

Illinois Coal and Dock Company. He admitted that the other coal was sold from in the neighborhood of $5.00 per ton to $5.50 per ton. In October, 1948 they produced 2,683 tons of which 1090 tons were sold to the Illinois Coal and Dock Company. He explained that during the months of May, June and July the figures did not clearly represent the coal produced at the mine but also included coal that had been stored down at the river and produced during other months.

He also admitted that during the Fall of 1949 and the Winter of 1950, during the United Mine Workers strike, he could have sold all of the coal that could have been produced and could have used some of the eleven employees.

SPECIFICATION OF ERRORS ASSIGNED

1. The Board erred in adopting a minimum dollar standard, disregarding all other facts and circumstances, as a basis for retaining jurisdiction, thus wiping out a vast number of its previous decisions and circumventing the intent of Congress as expressed in the National Labor Relations Act; the Court of Appeals for the Seventh Circuit erred, by implication, in ratifying this action by the Board, contrary to applicable decisions of other courts of appeal and of this court.

2. The Board and the Court erred in condoning the action of the Company in holding down production by the lockout and refusal to allow the men to work, even though they could have sold all the coal produced; this alone resulted in low dollar volume which took the Company out of the minimum standard requirement.

3. The Board and the Court erred in dismissing the complaint, for once having evoked its jurisdiction, it cannot arbitrarily withdraw that jurisdiction.

4. Assuming that the Board has the power to adopt such rules and regulations, the Court of Appeals was in error in holding that they can be made retroactive so as to change the outcome of the hearing after the evidence has been completed and the trial examiner's intermediate report issued.

ARGUMENT

Summary of Argument; Propositions of Law and Citation of Cases

I.

Congress intended act to apply to all business which affect interstate commerce regardless of the amount of business involved, unless doctrine of de minimis is applied.

A. The Act defines commerce as such without regard to amounts thereof involved.

Sec. 2 (6) and (7) National Labor Relations Act 1947.

B. Whether the activities of such business affect commerce within the meaning of the Act depends solely upon the facts and circumstances of each case.

Consolidated Edison Co. of N. Y. v. NLRB, 305 U. S. 197; 1 LC 17,038;

NLRB v. Jones and Laughlin Steel Corp., 301 U. S. 1; 1 LC 17,017;

NLRB v. Baltimore Transit Co., 140 Fed. (2d) 51; 7 LC 61,954.

C. It was not the intention of Congress to make the operation of the act depend on any particular volume of commerce than that of maxim de minimis; the courts have frequently held that the Act cannot be applied by a mere reference to percentages.

Santa Cruz Fruit Co. v. NLRB, 303 U. S. 453; 1 LC 17,031;

NLRB v. Fainblatt, 306 U. S. 601; 1 LC 17,045;

NLRB v. Cowell Portland Cement Co., 108 Fed. (2d) 198; 2 LC 18,481;

Brandeis & Son v. NLRB, 142 Fed. (2d) 977; 8 LC 62,221;

NLRB v. Richter's Bakery, 140 Fed. (2d) 870; 8 LC 61,996;

NLRB v. McGough Bakeries Corp., 153 Fed. (2d) 420; 10 LC 62,936;

Tyne Co. v. NLRB, 125 Fed. (2d) 832; 5 LC 60,937.

D. The operations of a coal company, even though small in dollar volume, which include the supplying of coal to railroads and other industrial consumers under the jurisdiction of the Board, are such as to require jurisdiction by the Board under the Act of Congress, previous decisions of the Board, and holdings of this Court.

NLRB v. Stremel, d. b. a. Crow Bar Coal Co., (CCA-10; 1944) 141 Fed. (2d) 317;

Southern Colorado Power Co. v. NLRB, 10 Cir., 111 Fed. (2d) 539, 541-543; 2 LC 18,593;

NLRB v. Crowe Coal Co., 8 Cir., 104 Fed. (2d) 633, 635-636; 1 LC 18,392.

II.

Assuming the Board has power to limit its jurisdiction based upon the dollar volume theory, such new rule or regulation cannot be made retroactive to affect pending cases.

NLRB v. Red Rock Co. and Red Rock Cola Co., USCA No. 13,375, Fifth Circuit, Decided Feb. 15, 1951, 19 LC 66,182;

Comm. of Int. Rev. v. Commodore, Inc., 135 Fed. (2d) 89;

Miller v. U. S., 294 U. S. 435;

Manhattan General Equip. Co. v. Comm. Int. Rev., 297 U. S. 129;

Helvering v. Reynolds Co., 306 U. S. 110.

Although there is some confusion in the authorities with respect to the power of the Board to dismiss a case for

jurisdictional reasons after the General Counsel has authorized the issuance of a complaint, we rather feel that the weight of authority at the present time is that the function of the General Counsel is to authorize the issuance of a complaint and to prosecute the same.

From that point on it is a question for the Board to determine whether or not under the facts and circumstances the business done by a company affects interstate commerce within the meaning of the Act.

There are two very serious questions which must be determined by this Court, apparently, for the first time so near as we are able to determine: (1) Can the Labor Board nullify the clear intention of Congress by adopting jurisdictional rules and regulations based upon arbitrary dollar values and use that in defining what affects interstate commerce without regard to the true facts then in existence? (2) Assuming that the Board has the power to adopt such rules and regulations, can they be made retroactive so as to change the outcome of a hearing after the evidence has been completed and the trial examiner's intermediate report issued?

Under the old NLRB Act, commerce was defined as "trade, traffic, commerce, transportation or communication among the several states, etc." The term, "affecting commerce" was defined as meaning "in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce, or the free flow of commerce." There was no change in these two provisions of the Act by virtue of the passage of the Taft-Hartley Law in 1947.

Although the Act gives any aggrieved person the right

to file an unfair labor charge, it gives sole discretion to the General Counsel to determine whether or not an unfair labor complaint can be issued. Once the complaint is issued, then the Labor Board has the jurisdiction to hear and determine the issues involved and to determine whether or not, under the foregoing statutes, a dispute is involved which affects commerce.

In the early history of the Board it accepted jurisdiction over most any case where there was any fair amount of interstate commerce involved.

In the early case of *Consolidated Edison Company of N. Y. v. NLRB,* 305 U. S. 197; 1 LC 17,038, the utility supplied 97.05% of the total electric energy sold in the City of New York. The Supreme Court found that part of this electric energy was used by railroads and freight terminals and although there were no percentages involved, the court found that interstate commerce was affected. However, for the reason that said opinion has a bearing upon the questions which we later raise, we point out that the Supreme Court said "And whether or not particular action in the conduct of intra state enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control is left to be determined as individual cases arise." This was the same language used by the Supreme Court in the case of *NLRB v. Jones and Laughlin Steel Corporation,* 301 U. S. 1, LC 17,017.

Some examples of where the Board has taken jurisdiction, are the following:

In the case of *NLRB v. Cowell Portland Cement Co.,* 108 Fed. (2) 198; 2 LC 18,481, apparently the interstate shipments constituted only 4% of the total business. (We

say "apparently" because the opinion is not too clear.) However, this case is squarely in point and supports our contention that the Board cannot arbitrarily refuse to exercise jurisdiction because of the small volume in dollars and cents. The Court said, quoting from the case of *NLRB v. Fainblatt*, 306 U.S. 601, 606; 1 LC 17,045:

> "The National Labor Relations Act 'on its face * * * evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts * * *. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis.' "

The Court then went on to say:

> "The quantity of cement shipped out of state is not *de minimis* merely because it is but a small percentage of respondent's total sales. Otherwise, we would have the anomaly of one plant under federal regulation because exporting its entire product of 14,000 barrels while alongside it another competing plant under state regulation because, though shipping the same amount of 14,000 barrels, they constituted, say, but 4 per cent of its product. Congress could not have intended that it would subject laboring men or employers to such a confusing and, in business competition, such a destructive anomaly. Nor is the quantity of a particular product shipped out of state *de minimis* merely because it is small in proportion to the total interstate commerce in that product from all the states or from the employer's state."

In the case of *NLRB v. Baltimore Transit Co.*, 140 Fed. (2d) 51, 7 LC 61,954, the Transit Company was engaged

only in operating a street, railway and bus transportation system in the City of Baltimore, Maryland. The Court said:

> "While the vehicles of the Company do not cross state lines, there can be no question but that they carry to and from work thousands of passengers who are engaged in the production of goods that flow in interstate commerce."

Thus, the Circuit Court of Appeals in the above case affirmed the position of the National Labor Relations Board that the business of the Company affected interstate commerce.

In the case of *NLRB v. McGough Bakeries Corp.*, 153 Fed. (2d) 420, 10 LC 62,936 the respondent's bakery shipped none of its products in interstate commerce, but it did import into the state the greater part of its raw materials, such imports amounting to about $25,000.00 per month. The Court said:

> "Imports as well as exports are interstate commerce and would be equally affected by a work stoppage, within the meaning of the * * * Act, and $300,000.00 worth of such commerce per year is considerable enough to warrant the Board in taking jurisdiction."

Under the new rules and regulations of the Labor Board, it would deny itself jurisdiction over the foregoing case, inasmuch as it now will only accept jurisdiction where there are no interstate sales but interstate purchases amounting annually to more than $500,000.00, if such purchases are direct, or $1,000,000.00 if such purchases are indirect. Does the Labor Board have the power to overrule the foregoing decision and say that it no longer is the law?

In the case of *NLRB v. Richter's Bakery*, 140 Fed. (2d) 870; 8 LC 61,996, the Richter's interstate business consisted

of shipments from outside the State to it of approximately 25% of its total purchases of raw material and the Circuit Court of Appeals held that that was most certainly not such a sum as to be considered in the category of *de minimis.*

In the case of *Tyne Co. v. NLRB,* 125 Fed. (2d) 832; 5 LC 60,937, the petitioner was engaged in the wholesale plumbing supply business in Chicago. It imported about 50% of its total products from outside the State of Illinois and reshipped about 25% of its total sales to outside points. This Court agreed with the Labor Board in holding that this did affect commerce.

In the case of *Brandeis & Son v. NLRB,* 142 Fed. (2d) 977; 8 LC 62,221, the petitioner contended that the Board did not have jurisdiction because it was a retail department store and that the doctrine of *de minimis* was applicable to its interstate sales. The facts as proven showed that in 1943 it did eight million five hundred thousand dollars worth of business and that its out of state mail order sales amounted to only twenty thousand dollars or .0024% of its total sales; that it sent 8,900 packages out of state, which amounted to 4% of the amount of packages delivered within the state for the same period. Further, that total out of state sales amounted to only 2.2% of its total sales. The Court said:

> "The courts have frequently held that the Act 'can not be applied by a mere reference to percentages.' Santa Cruz Fruit Packing Company v. National Labor Relations Board, supra at p. 467; National Labor Relations Board v. Fainblatt, 306 U. S. 601, 607-608 (1 Labor Cases 17,045); National Labor Relations Board v. Crowe Coal Co., 8 Cir., 104 F. 2d 633, 639 (1 Labor Cases 18,392); National Labor Relations Board v. Central Mo. Tel. Co., 8 Cir., 115 F. 2d 563, 566 (3 Labor

Cases 60,158); National Labor Relations Board v. J. G. Boswell Co., 9 Cir., 136 F. 2d 585, 589 (7 Labor Cases 61,673). The application of the Act does not depend upon the magnitude of the business nor the comparative amount of interstate sales. The test of the Board's jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of such a relationship between the employer and his employees to commerce that an unfair labor practice would lead or tend to lead to a labor dispute burdening or obstructing the free flow of commerce. Sections 10(a) and 2(7); National Labor Relations Board v. Fainblatt, supra. In brief, the jurisdictional test in such a case as the present one is whether the stoppage of the business by reason of labor strife would tend substantially to affect interstate commerce. The principle applicable is one of degree. When the unfair labor practice involved is found to have such a close and substantial relation to the free flow of interstate commerce that the practice tends to obstruct that commerce, the jurisdiction of the Board to apply the preventive remedies of the Act is undoubted.

"The foregoing rules indicate the scope of the Board's jurisdiction under the Act whether the labor dispute involved occurs in a manufacturing establishment, a mining enterprise, a banking or a retail mercantile business."

In the case of *Santa Cruz Fruit Packing Company v. NLRB,* 303 U. S. 453; 1 LC 17,031, the petitioner shipped approximately 37% of its goods in interstate commerce. The Supreme Court upheld the contention of the Board that this constituted a case affecting interstate commerce and said:

"To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of

degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

"There is thus no point in the instant case in a demand for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases. The critical words of the provision of the National Labor Relations Act in dealing with the described labor practices are 'affecting commerce' as defined (Sec. 2(6)). It is plain that the provision cannot be applied by a mere reference to percentages and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 per cent, and not to more than 50 per cent, of its production cannot be deemed controlling. The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."

The petitioner has cited at some length the foregoing cases, to show the principles that have been set forth by this Court and the various courts of appeal in regard to this jurisdictional question prior to the adaptation of these jurisdictional standards by the Labor Board. There are, however, several cases in which this question has been discussed in regard to coal mining operations. In the matter of Joseph Stremel d/b/a Crow Bar Coal Company, 48

NLRB 660, the Board considered the effect on interstate commerce of operations of small coal producers and in asserting jurisdiction, it said:

> "It is well settled that operations of the Act does not depend on any particular volume of commerce affected more than that at which the courts have applied the 'maxim de minimus'."

This case subsequently came to the Court of Appeals for the Tenth Circuit and is cited as 141 Fed. 2d, 317; 8 Labor Cases 62,065.

The respondent, the Court noted, was engaged in the operation of a coal mine near Hayden, Colorado and sold approximately 20% of its coal production to the Denver and Salt Lake Railway Company. The Court said that the railway company used such coal for locomotive fuel and as it was a common carrier engaged primarily in the transportation of interstate freight, the Board had jurisdiction.

The Court relied upon the cases of Southern Colorado Power Co. v. NLRB, 111 Fed. 2d, 539; 2 LC 18,593 and NLRB v. Crowe Coal Company, 104 Fed. 2d, 633; 1 LC 18,392.

In the former case, the Court held that the National Labor Relations Board had jurisdiction over the operation of an electrical company even though only 6% of its total output went into interstate commerce. Saying that the test in each case is not the percentage of output of a company going into interstate commerce, but the effect thereof. It is interesting to note that Rawalt Company is a company operating a single mine as was the Respondent in the Crow Bar Coal Company case, and in fact sold approximately 30% of its annual production to the Illinois Coal and Dock Company, Peoria, Illinois, an organization which was stipulated to be

engaged in interstate commerce. Thus, it is apparent that without jurisdictional standards recently set up by N.L.R.B. the Board would have asserted jurisdiction in this case if it were to follow a policy consistent with its former actions. Certainly, the trial examiner so believed in rendering his decision as he relied on the Crow Bar Coal Case among others to sustain the jurisdiction of the Board.

It is to be noted that the hearing in the instant case was held on June 13 and 14, 1950. The trial examiner's intermediate report was issued on August 31, 1950 finding that Rawalt was engaged in interstate commerce and had been guilty of unfair labor practices.

On October 3, 1950 the National Labor Relations Board adopted a set of standards which were not released for publication until October 6, 1950. The newspaper release which was put out by the Board is in part as follows:

Release for morning papers (R-342)
Friday, October 6, 1950

N. L. R. B. CLARIFIES AND DEFINES AREAS IN WHICH IT WILL AND WILL NOT EXERCISE JURISDICTION

The National Labor Relations Board today announces the establishment of standards which will govern its exercise of jurisdiction under the Taft-Hartley Act.

The various "yardsticks" which will be used by the Board in future cases involving all enterprises were set forth in eight unanimous decisions issued simultaneously. Pointing out that these standards "reflect, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues," the Board said:

> The time has come when experience warrants the establishment and announcement of certain standards

which will better clarify and define where the difficult line can best be drawn.

> The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should, in our opinion, be maintained.

The Board thereby reiterated its policy of not exercising jurisdiction, despite its power to do so, over business operations so local in character that a labor dispute would be unlikely to "have a sufficient impact upon interstate commerce to justify an already burdened Federal Board in expending time, energy and public funds."

The plant that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution, the Board will exercise jurisdiction over:

1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems).

2. Public utility and transit systems.

3. Establishments which operate as integral parts of a multistate enterprise (for example, chain stores, and branch divisions of national or interstate organizations).

4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year.

5. Enterprises which furnish services or materials

necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year.

6. Any other enterprise which has:

(a) a direct inflow of material valued at $500,000 a year; or

(b) an indirect inflow of material valued at $1,000,000 a year; or

(c) a combination inflow or outflow of goods which add up to at least a total of "100%" of the amounts required in items 4, 5, 6 (a) and (b) above.

7. Establishments substantially affecting national defense.

We have no knowledge as to when the foregoing standards were actually put out to the various attorneys engaged in labor law practice; however, undoubtedly, these were received by most attorneys sometime in the latter part of October.

It will be noted that the decision of the Board in the instant case, which was issued on November 14, 1950, was based on the ground that the value of its sales to interstate firms was less than $50,000 and that it would not effectuate the policies of the Act to assert jurisdiction in the case. In saying this, the Board also said:

> "on these facts we find in agreement with the trial examiner that the Respondent's operations affect commerce within the meaning of the Act."

Therefore, this question boils down to a clear cut issue that the Board admits that commerce is affected, but that because of the low dollar volume of interstate business they can't be bothered. Does the Board have the power to deny the benefits of the Act to a group of working men by arbitrarily adopting such a rule?

It is interesting to note the comments contained in the Commerce Clearing House Reports with regard to the adoption of these standards, Paragraph 14,046:

> "uncertain, too, is the question of whether the Board has authority to apply its standards or any other discretionary standards in accepting or rejecting cases or whether it must act in every case however small in which it has power to act."

We were all anxiously awaiting the opinion in the case of Haleston Drug Stores, Inc. v. NLRB, (No. 12,412) and H. W. Smith, d/b/a as A-1 Photo Service v. NLRB, (No. 12-466) which has just recently been handed down by the U. S. C. A. for the 9th Circuit. The citation for this case is 187 Fed. (2d) 418. In that case, which is a combined case, one of the Petitioners (A-1 Photo Service) was engaged in the retail photography business, purchasing supplies totaling $100,000 annually, of which 44% was obtained from outside wholesalers, with practically all of its sales being made to local retail customers. The trial examiner concluded that the petitioner was engaged in commerce, that the Board had jurisdiction and that Respondents had been guilty of certain unfair labor practices. The Board dismissed the complaint in its entirety and did not disturb the findings of the trial examiner that the petitioner was engaged in commerce. They cited that the Employer's business is essentially local in nature and relatively small in size and that the interruption of his operations by a labor dispute could have only the most remote and insubstantial effect on commerce. The Board ordered dismissal on the further ground that the assertion of jurisdiction would not effectuate the purpose of the Act.

In the companion case, Haleston Drug Stores petitioned

for an election. About 30% of its purchases was shipped to it from points outside the state and all of its sales were made locally within the state. The Board concluded that the assertion of jurisdiction would not effectuate the policy of the Act, inasmuch as the record shows that the petitioner's business was essentially local in character, and dismissed the proceeding.

Prior to this dismissal the petitioner had filed unfair labor charges and the General Counsel had issued an unfair labor practice complaint. The trial examiner granted the union's motion to dismiss predicating his action on the ruling of the Board in the representation case.

Apparently the question of the minimum requirements for jurisdiction adopted by the Board was not raised in this proceeding, but only the question as to whether or not, if the General Counsel had exercised his final authority in issuing an unfair labor complaint, the Board had the power to dismiss such complaint upon jurisdictional grounds. The court held squarely that the Board did have such power. Apparently the question was not raised as to whether the Board had abused its discretion in dismissing the complaint nor was there any point made as to whether or not the petitioners were actually engaged in interstate commerce, or whether or not the Board had the power to arbitrarily fix dollar volume of business as a jurisdictional requirement, and therefore, these questions were not decided by the Court.

We are disappointed that the foregoing decision did not clarify these issues. However, we have been informed that the Haleston Drug Stores, Inc. case is now pending on a petition for certiorari to this Court, which was filed

on May 11, 1951 and docketed as No. 59 for the October Term, 1951.

We have distinguished the contentions in the foregoing case with those of the instant case for the reason that there are different problems involved and the issue of the matter of minimum standards has not been squarely raised. However, even if it were raised, we would not have the same problem involved as the instant case, where we have a coal mine as a part of an overall national picture of coal production and the union representation of miners involved throughout large areas in such coal production. It must be remembered that there are many thousands of these small coal mines throughout the United States whose annual production is small, but when taken together, account for a large percentage of the coal used in interstate commerce and in other activities affecting interstate commerce.

The power to make any particular rule or regulation must be found in the legislation which established it. That is, its charter, and the agency cannot exceed the powers given in that charter because that would be encroaching on the province of Congress. The test in determining this presence or lack of power is, of course, the intent of Congress. What is the intent of Congress in this case?

As far back as the time of the old Wagner Act, the phrase, "affecting commerce," was not defined in the statute in terms of any definite standards, but the Board was given discretion to decide what affected commerce in each case, dependent upon the facts and circumstances of each case. Later, when the NLRB had accumulated quite a backlog of cases, Congress placed some restriction on the use of funds appropriated to the agency by such acts as the

Appropriation Act of 1944. However, even in view of this temporary crisis, Congress did not change the section of the Act which defined commerce, but left the matter to be determined as before, on a case to case basis. Furthermore, when NLRA was fundamentally changed in 1947, the section of the Act which defined commerce was not changed, and no standards were set up to determine when the Board would or would not take jurisdiction. Without exception Congress has evidenced its intent to continue the discretion in the Board to decide each case on the facts involved. We are not contending that the Board did not have this discretion to decide each case on its own facts, as apparently was the decision of this Court, as evidenced by its opinion, but we do contend that there is no power granted to the Board by the NLRA to set up these standards. Certainly the mere fact that Board considers these standards desirable cannot justify their adoption unless the provisions of the Act itself justify the exercise of this power by the Board.

It is true that the courts have stated, as the Court of Appeals indicated in its opinion, that reviewing courts should not substitute their judgment for that of the administrative agency or unduly interfere with its functioning. However, there would be no question about the fact that it is the duty of the reviewing court to reverse the Board when it has exceeded the power granted to it by Congress.

If Congress had intended that these standards of jurisdiction be set up, it would have defined these standards in the Act itself or would at least have delegated the power to the Board to set them up, and we contend that the absence of such a provision in the Act clearly indicates the

intention of Congress that they should not be set up. The Court of Appeals, however, has completely ignored any question of what Congress intended in regard to the imposition of these standards, except to say that discretion was given to the Board to decide in any particular case whether or not it would take jurisdiction and whether or not the taking of such jurisdiction would effectuate the policies of the Act.

It is our contention that the Court of Appeals should have put this matter at rest by deciding clearly whether or not Congress has authorized the imposition of these jurisdictional standards by the Board. In its opinion the Court seems to have ignored the question. Surely the Board is not a law unto itself.

The Court of Appeals has stated in its opinion that the Board is vested with wide discretion in determining whether a proceeding once instituted may be abandoned and that the Act does not create private rights for individuals. Certainly the Board must maintain some minimum standard of fair play in its procedure. Here the Board has heard the evidence in this case on the question of whether or not this business involved affected interstate commerce within the meaning of the Act and then, after all the evidence is taken, set up the standard concerning which the Petitioner had no opportunity to offer evidence to show that the Respondent met that standard, even if it were validly established. Certainly this seems to exceed the limits of fair play in administrative procedure. The Court has ignored the fact that although the Board has ample discretion in procedural matters, the Act should not be administered by the Board so as to bring it into disrepute.

The Court of Appeals has ignored the fact that the re-

spondent, Rawalt Company, held its production down because of the very unfair labor practice which is the basis of the complaint. In other words, if the mine had worked full time under all the facts and circumstances of other mines being closed because of the United Mine Workers strike, the production for interstate commerce would greatly have exceeded the minimum requirement. This is only one of the facts and circumstances which should be taken into consideration in determining the jurisdictional question.

As this Court well knows, the agents of the Labor Board gather the evidence, and the attorney for the Labor Board presents the evidence at the hearing. The agents of the Board were well satisfied that they had produced sufficient evidence to assert jurisdiction. The Trial Examiner, who tried the case, so concluded. The Board likewise agreed, but because it had adopted this arbitrary minimum standard, said it could not retain jurisdiction any longer, disregarding the other facts and circumstances.

It must be remembered that the Charge Against the Employer in this matter was filed July 18, 1949; the Complaint was issued May 22, 1950; and the final decision by the Board was rendered November 14, 1950.

We ask the question again as to whether or not the Board is acting in good faith in asserting jurisdiction by the issuance of the Complaint and then, approximately 18 months later, changing its mind and saying it does not have jurisdiction. If we had a case where the issue were tried by an independent court, we might have a little different situation, but here the agents of the Board and the Board itself had knowledge of all of the facts to be presented because of its preliminary investigation.

It is fundamental that a law or ruling which grants jurisdiction can be changed prior to the filing of a suit. However, such law cannot be amended so as to eliminate jurisdiction and defeat rights of litigants after such suit has been filed.

The evidence had been heard, the Trial Examiner's report made, on the basis of the then existing rulings that the Board did assert jurisdiction on the facts and circumstances involved in each particular case. Part of these facts and circumstances were contained in such report when the Trial Examiner said:

> "While Respondent's operations in early 1949 were apparently not too profitable, the evidence is undisputed that commencing in August of that year, due in part to the United Mine Workers 3-day week and strike, market conditions improved to the extent that Respondent decided to employ additional miners and thereby increase its output of coal. Thus, it was undenied that Neil, Respondent's president, informed the pickets at that time, in effect, that if the men would abandon the Union that they 'could all be working instead of sitting on the grass.' In November or December 1949, Neil likewise told Bettison that if Respondent were permitted to operate 'an open mine' that he could use four or five additional men. That work was also available in January 1950 was demonstrated by the offer made during that month by both Neil and Adam to the three, Lawvers, Riley, and Sleeth, that they could be put back to work if they would arrange to have the unfair labor practice charge previously filed against Respondent dismissed." (App. 83-84) and further:
>
> "Rawalt Coal Company is an Illinois corporation, engaged in mining and selling coal near Canton, Illinois. During the period September 1, 1948, to August 31, 1949, Respondent produced approximately 30,000

> tons of coal and sold approximately 9,000 tons thereof to the Illinois Coal and Dock Company. Of the amount so purchased by the latter company, approximately 2,500 tons were sold by it to the Toledo, Peoria and Western Railroad, an interstate common carrier. The remainder of the coal so purchased by the Illinois Coal and Dock Company was sold to the Commercial Solvents Corporation, whom the Board in November 1948 found to be engaged in commerce within the meaning of the Act, the Central Illinois Light Company of Peoria, and other industrial and domestic consumers. I find that Respondent is engaged in commerce within the meaning of the Act." (App. 65.)

For the reasons hereinabove stated, we submit that the adoption of this arbitrary rule was applied retroactively and the complaint dismissed not on the basis of the facts and circumstances involved, but by the adoption of a new rule which was applied retroactively.

We believe that the foregoing position was sustained in the case of NLRB v. Red Rock Co. and Red Rock Cola Co., being Number 13,375 decided by the United States Court of Appeals, 5th Circuit, on February 15, 1951, cited as 187 Fed. 2d 76; 19 LC 66,182, where the Court held:

> "The amount of interstate commerce being done by that respondent was sufficient to support the Board's jurisdiction. The fact that by a self-denying rule or order made since this complaint was filed and order entered, the Board has set limits to the exercise in the future of the jurisdiction it possesses is not a matter of which respondent may avail. The petition to enforce as to Red Rock will be granted. It will be denied as to Red Rock Cola Co."

In the above case the opinion does not appear to contain any definite statement as to the amount of interstate commerce being carried on but the headnote says that respond-

ent obtained approximately 30% of its supplies from outside the state. The respondent challenged the order of the Board for the reason that since the Board had assumed jurisdiction it had adopted the new set of rules hereinabove mentioned, limiting its jurisdiction to certain cases dependent upon volume of business, and that the respondent should benefit from the adoption of such regulation. However, the Court said that the respondent could not benefit by this regulation which had been adopted after the hearing.

Thus, the court held squarely that a respondent could not take advantage of the new regulation of the Board which limited its jurisdiction. We believe that it necessarily follows that the Board itself cannot take advantage of this regulation and make it retroactive where it has assumed jurisdiction and all of the evidence has been taken.

If the law were otherwise, then we would go through such a state of confusion that neither an employer nor employee would know what is the law and they might be under the law one day and out the next by the adoption of arbitrary limits of jurisdiction which, if the same could be made retroactive, would always keep both sides in hot water.

It is fundamental that substantive rights created by law cannot be made retroactive unless the statute expressly provides for such retroactive rights. However, it has firmly been held, and we know of no case to the contrary, that administrative rules and regulations can never be made retroactive, particularly where they deal with substantive rights and procedural rights which limit jurisdiction and could in effect deny substantive rights.

In the case of *Commissioner of Internal Revenue v. Commodore Inc.*, 135 Fed. (2d) 89, the Court said:

> "It would hardly seem necessary to cite authorities in support of the well settled rule that a statute will not be given retroactive force unless that purpose is expressed in clear and positive language or is to be inferred by necessary, unequivocal and unavoidable implication. * * * We look in vain for any suggestion in the section (Sec. 276 Bankruptcy Act) that Section 270 retroactively applied to the tax years here involved. * * * Petitioner points out that with the approval of the Secretary of the Treasury he promulgated amended regulations to the effect that Section 270 applies to all tax years ending prior to the enactment of Section 270, or the Chandler Act, but it is needless to say that what Congress did not do by positive enactment petitioner cannot do by regulations. Such regulation cannot amend the law. Miller v. U. S. 294, U. S. 435."

In the case of *Miller v. U. S.*, 294 U. S. 435, the Supreme Court denied a soldier recovery on a war risk policy where the Veterans Administration, some eleven years after the injury, had adopted a rule defining what constituted disability. The court said that it was not applicable because it was not in effect at the time of the injury and the Veterans Administration had no power to make it retroactive, and said that such regulation could not in itself in effect amend the statute.

In the case of *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U. S. 129, the Court said:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress but the power to adopt regulations to carry into effect the

will of Congress as expressed by the statute. A regulation which does not do this but operates to create a rule out of harmony with the statute is a mere nullity." (Lynch v. Tilden Produce Co., 265 U. S. 315, etc.)

To this same effect also see the case of *Helvering v. Reynolds Co.*, 306 U. S. 110.

The coal mining industry itself is such an industry which directly affects interstate commerce. There are thousands of small coal mines throughout the United States which will automatically be taken out of the jurisdiction of the Labor Board if the decision and order of the Board in the instant case is allowed to stand and become law. Practically all of these mines conduct their business by hauling their coal to shipping points by trucks, with some of their coal being shipped on railroads in interstate commerce, some of it being delivered to railroads to use in running locomotives, some of it being delivered to utilities and some of it being sold to coal yards for consumption by private users. In the majority of cases, very few of these mines will be able to meet the dollar volume requirements of the new regulations of the Board.

It is conceivable that operators of coal mines could split up their business so as to exclude themselves completely from the jurisdiction of the Board. It is also conceivable that under this new regulations a small coal mine could be producing only $49,000.00 worth of coal annually, all of it going into interstate commerce and not be under the Act even though this constituted 100% of its output, where, on the other hand, a coal mine could produce $2,000,000.00 worth of coal annually with only $51,000.00 of it going into interstate commerce, or less than 3%, and it would be subject to the Act. We submit that this was not the clear intent

of Congress and constitutes an attempt by the Labor Board to amend the statute by rules and regulations, and thus evade its clear duty.

We recognize that the courts have frequently held that it is within the power of the Board to examine each individual case on its own merits and determine whether it is engaged in such interstate commerce which would require the Board to assert jurisdiction to effectuate the policies of the Act. There has been much conflict in the asserting of such jurisdiction but our courts have generally held that it is pretty much up to the Board to determine this fact. We know of no cases where the courts have reversed the Labor Board saying that there was no sufficient interstate commerce to justify the jurisdiction.

In the instant case the Board found that the business of Rawalt did affect commerce, but purely and simply denied its jurisdiction because of the foregoing mentioned rule based upon dollar volume of business. Although this question has not been passed upon directly by the courts, by inference it would seem that our courts have said the Board does not have this power. As was said in the case of *Brandeis & Son v. NLRB*, 142 Fed. (2) 977; 8 LC 62,221:

> "The Courts have frequently held that the Act 'can not be applied by mere reference to percentages'."

This was again repeated in the case of *Santa Cruz Packing Co. v. NLRB*, 303 U. S. 454; 1 LC 17,031, where the Court said:

> "The critical words of the provision of the National Labor Relations Act in dealing with the described labor practices are 'affecting commerce' as defined. It is plain that the provision cannot be applied by a mere reference to percentages . . ."

This was never more clearly stated than in the case of *NLRB v. Fainblatt,* 306 U. S. 601; 1 LC 17,045, where the Court said:

> "... we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend upon any particular volume of commerce than that to which courts would apply the *maxim de minimis.*"

No one will contend that in the instant case the amount of volume of interstate business done by Rawalt comes within the doctrine of de minimis for the reason that it amounts to almost 50% of the dollar volume of business done by Rawalt during the year preceding the hearing.

Much has been said by our courts to the effect that only the public interest is involved in these labor disputes. Many are prone to overlook the fact that the Act was passed, not only for the protections of the public to prevent interference with interstate commerce, but also for the protection of industry against unfair labor practices by labor unions and on the other hand, to protect individual workers, not only from restraint and coercion by union leaders, but also on the part of employers. It is true that these private rights which are guaranteed by the Act to the individual are based upon the theory that the industry in which he is employed affects commerce.

It will be noted that the trial examiner in the instant case recommended that the employees who had been locked out by the employer be made whole for the back pay lost on account of such unfair labor practice on the part of the employer. If these rights are denied to these individuals by the use of arbitrary dollar volume regulation of the Board, then these employees have no recourse whatsoever.

Their only recourse is through the channels of the Labor Board, as provided by the Act.

We respectfully submit that inasmuch as the Board has admitted in its decision and order that the business of Rawalt does affect commerce this Court should hold that the Board has exceeded its authority in adopting the $50,000 regulation and reverse the order of the Board. This most certainly does amount to an abuse of its discretion.

Congress passed an act which has been construed by the Supreme Court to mean that any business which affects commerce, no matter how small, so long as it is not de minimis, comes under the act. The Labor Board does not have the power to nullify the act and intention of congress by refusing to take jurisdiction in a case which does affect commerce.

Assuming, for the sake of argument, that the Board does have this power, can it by changing its rules make it retroactive? This case was tried more or less on the assumption by all parties concerned, even including Rawalt, that the Board had jurisdiction. No effort was made to produce evidence about purchases by Rawalt, or to bring in officers of the Illinois Coal and Dock Company to definitely nail down the dollars and cents values of its sales into interstate commerce. Even the stipulations entered into more or less took it for granted that the Board had jurisdiction. If there had been any question along this line certainly a more determined effort would have been made to produce more evidence along this line so there would have been no uncertainty. We know of no case in our Federal procedure where an administrative rule or regulation has been made retroactive. In fact all of the decisions that we have found as have been previously pointed out,

hold that such cannot be made retroactive. This is like playing a football game and then after the result is known, changing the rule so that the other side can win. At most, it would seem that the only fair thing, if there is any doubt about the matter, would be to order the Board to take additional testimony concerning interstate commerce.

Certainly Rawalt did not dispute the authority of the Board to exercise its jurisdiction after the intermediate report, when it wired the Labor Board that it was engaged in bona fide negotiation to settle re the intermediate report (App. 61). Of course after it couldn't settle on its own terms, then it filed exceptions questioning the jurisdiction of the Board.

To allow this ruling of the Board to stand will open the door to wholesale fraud to circumvent the act. Businesses will purposely keep their sales within the dollar limits set by the Board and thus escape the consequences of its own wrong doings. In the instant case the evidence only shows what happened during the year prior to August 31, 1949, although the hearing was held in June, 1950. It must be remembered that the employees did not work after May, 1949 and therefore the volume is not correctly reflected for the latter months if all of the men had been working. As was admitted by the officers of the company, the Company could have sold all of the coal they could have produced because of the strike of the United Miners and the large demand for their coal.

If this dollar volume proposition had been in the minds of the parties when the hearing was in progress they would have compelled the company to produce the records of coal produced and prices charged immediately prior to the

time of the hearing, when the evidence showed that coal was selling as high as $22 per ton because of the United Miners strike and three day work week. Was there a national emergency at that time? Everyone in the country thought so enough that schools were closed, railroads stopped running and industry was pleading for coal. Rawalt could have sold every ton in interstate commerce that it could have produced, yet it chose to lock out its employees and ignore the demand for coal. Because its dollar volume was low during this period the Board says it is not under the act and therefore the rights of the employees are to be denied.

CONCLUSION

If the decision of the Board and the Court of Appeals for the Seventh Circuit is allowed to stand, then a state of confusion will exist in the practice of labor law, particularly in the coal industry:

1. It will be impossible to advise labor unions, which have signed master contracts for the coal industry with operators over a large area, as to whether or not such contracts comply with the law, for the reason that some coal mines will come within the jurisdiction of the Board and others will not.

2. Such contracts are customarily signed for a period of two to three years and it will be impossible to anticipate what the dollar value of the production of a mine will be each year in advance.

3. Many of the small mines operate on a seasonal basis except during national emergencies when they operate at full production.

4. Welfare funds paid by operators of small mines are commingled with funds paid by large operators and the benefits are spread evenly throughout the industry on the basis of need of coal miners, rather than on the basis of the amount of contributions made by the operators of small mines.

5. A large part of the coal from the small mines is sold to brokers and others, who commingle it with other coal, and it is impossible to trace the exact amounts which flow in interstate commerce.

6. Since the coal industry is a particular industry based on large scale union organization, it should be distinguished

from any particularly local type of operation by other small businesses and should be treated as affecting commerce generally, except in proven cases where practically the entire output of a coal mine is used in a local business which has absolutely no connection with interstate commerce.

WHEREFORE, your Petitioner prays that this Court will grant the writ of certiorari to the Court of Appeals for the Seventh Circuit so that this case may be reviewed by this Court and that the order of the Labor Board dismissing the unfair labor complaint in this matter be reversed, with directions to retain jurisdiction of this matter and decide said case on the merits as to whether or not unfair labor practices are involved; or, in the alternative, that the Labor Board be ordered to reopen the testimony in this matter so that further evidence can be adduced regarding interstate commerce.

Respectfully submitted,

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DATED: September 5, 1951

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 306

LOCAL UNION NO. 12, PROGRESSIVE MINE WORKERS OF AMERICA, DISTRICT NO. 1, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, AND RAWALT COAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 103-108) is reported at 189 F. 2d 1. The decision and order of the Board (R. 92-94) is reported at 92 NLRB, No. 12.

JURISDICTION

The decree of the court below was entered on May 23, 1951 (R. 109), and the court denied rehear-

ing on June 11, 1951 (R. 110). The petition for a writ of certiorari was filed on September 10, 1951. The jurisdiction of this Court is invoked under 29 U. S. C. 1254 (1), and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED[1]

1. Whether the Board, instead of exercising its discretion to decline jurisdiction *ad hoc,* may define, by general rules which include quantitative standards, the enterprises over which it will assert jurisdiction.[2]

2. The relevant jurisdictional standard was enunciated by the Board in another case, which was decided after the trial examiner's report in the instant case had been issued but before expiration of the time for filing exceptions thereto. The second question presented is whether, under these circumstances, the Board could properly apply this jurisdictional standard when the instant case subsequently came to it for decision.

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[1] We believe that question number 1 herein embraces the matters covered by petitioner's question number 1, and that question number 2 herein embraces the matters covered by petitioner's questions numbered 3 and 5. Petitioner's questions numbered 2 and 4 (Pet. 5)—which appear to challenge the Board's factual findings with respect to the Company's business—present only evidentiary issues which do not warrant review by this Court. Indeed, petitioner itself concedes that the "serious questions" it urges are those embraced by questions numbered 1 and 2 herein (Pet. 21).

[2] This case (cf. Pet. 20-21) does not—as does *Haleston Drug Stores, Inc.* v. *National Labor Relations Board,* 187 F. 2d 418 (C.A. 9) No. 59, this Term, certiorari denied October 8, 1951—present any question as to the allocation of the discretionary authority to decline jurisdiction as between the Board and its General Counsel.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are set forth in Appendix A, *infra,* pp. 12-15.

STATEMENT

On May 15, 1950, petitioner filed an amended unfair labor practice charge with the Board's Regional Director for the Thirteenth Region, alleging that the Rawalt Coal Company, herein called the Company, was engaging in unfair labor practices within the meaning of Sections 8 (a) (1), (3), (4), and (5) of the Act (R. 1-3). An unfair labor practice complaint based upon the foregoing charge was issued on May 22, 1950 (R. 5-9). A hearing was then held before a trial examiner, who issued his intermediate report on August 31, 1950 (R. 63-92).

The trial examiner found that the Company, an Illinois corporation, was engaged, at a small slope mine near Canton, Illinois, in mining and selling coal. As the mine was not located on a railroad, shipments therefrom were made by truck (R. 65-66; 22-23, 44-45). It was further found that, during the period September 1948 through August 1949, the Company produced approximately 30,000 tons of coal (R. 65; 10), of which about 9,000 tons were sold to the Illinois Coal and Dock Company (R. 65; 22-23, 27-32). Illinois Coal and Dock Company, in turn, disposed of its tonnage as follows: 2,500 tons were sold to the Toledo, Peoria and

Western Railroad, an interstate common carrier; the remainder was sold to the Commercial Solvents Corporation of Peoria (whom the Board had previously found to be engaged in commerce within the meaning of the Act, 80 NLRB 277), the Central Illinois Light Company of Peoria, and other industrial domestic consumers (R. 65; 23, 43).

On the basis of these facts, the trial examiner concluded that the Company was engaged in commerce within the meaning of the Act, and that the Board, therefore, as a matter of law, had jurisdiction of the case (R. 65). He thereupon proceeded to the merits, finding that the Company had committed unfair labor practices in violation of Sections 8 (a) (1), (3), and (4) of the Act, but had not refused to bargain with petitioner in violation of Section 8 (a) (5) (R. 87-88). Both petitioner and the Company filed exceptions to the trial examiner's intermediate report (R. 61-63). In its exceptions (R. 62-63), as in its answer to the complaint (R. 10-11), the Company contested the Board's jurisdiction.

The Board accepted the trial examiner's findings of fact as to the nature and volume of the Company's business operations, and further found that the Company's entire coal production of 30,000 tons, during the period September 1, 1948, to August 31, 1949, was either sold at the mine to truckers for resale locally, or was sold and delivered by truck to the Illinois Coal and Dock Company in Illinois (R. 93; 10, 44, 52). As to the ap-

proximately 9,000 tons sold during this period to the Illinois Coal and Dock Company, the Board found that the dollar value thereof was approximately $35,000 (R. 93; 27-32). The Board pointed out that there was no evidence in the record that the Company had made any out-of-State purchases or that any of the coal produced by the Company had been shipped outside the State (R. 93).[3]

On these facts, the Board concluded, as did the trial examiner, that the Company's operations affected commerce within the meaning of the Act, and were thus subject to the jurisdiction of the Board (R. 93). The Board added, however, that, as a matter of policy, it had, "since the issuance of the Intermediate Report in this case, * * * adopted certain minimum requirements for the assertion of jurisdiction," and therefore it "becomes necessary for us * * * to examine the facts in order to ascertain whether these minimum requirements have been met" (R. 92-93).[4]

These minimum requirements, insofar as pertinent here, and the reasons for their adoption, were explained by the Board in *Hollow Tree Lumber Co.*, 91 NLRB 635, 636, as follows:

> The Board has long been of the opinion that it would better effectuate the purposes of the

[3] Although it appeared from the record that some of the coal produced by the Company was ultimately shipped from Canton by rail, the Board noted that the destination of such shipments was not shown (R. 93; 44).

[4] The Board's mimeographed release of October 6, 1950, which sets forth the jurisdictional yardsticks in full, is reprinted in Appendix B, *infra*, pp. 15-24.

Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should, in our opinion, be maintained. The time has come, we believe, when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.

The Board has determined that it will exercise jurisdiction over those enterprises which affect commerce by virtue of the fact that they furnish goods or services necessary to the operations of other employers engaged in commerce, without regard to other factors, where such goods or services are valued at $50,000 per annum or more, and are sold to: (a) public utilities or transit systems; (b) companies which function as instrumentalities and channels of interstate and foreign commerce and their essential links; or (c) enterprises engaged in producing or handling goods destined for out-of-State shipment, or performing services outside the State, in the value of $25,000 per annum or more. This standard reflects, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues.

Examining the commerce facts here in the light of this standard, the Board stated (R. 93):

> * * * As all [the Company's] coal was sold locally and the value of its sales to interstate firms over which we would assert jurisdiction was less than $50,000, we find, in accord with our announced policy,* that it would not effectuate the policies of the Act to assert jurisdiction in this case. We shall, therefore, dismiss the complaint in its entirety.

The Board's order dismissing the complaint was entered on November 14, 1950 (R. 92-94).

Petitioner then initiated proceedings in the court below, under Section 10 (f) of the Act, for review of the Board's order. The court held that the Board's action was lawful and proper, and accordingly dismissed the proceeding (R. 103-109).

ARGUMENT

1. The holding of the court below that the Board has power to promulgate criteria for the purpose of limiting the exercise of its vast legal jurisdiction, and to govern its action in particular cases according to these standards, is clearly correct and petitioners' contrary contention (Pet. 7-8, 21-36) presents no substantial question warranting review by this Court.

In the light of the express discretionary language of Section 10 (a) of the Act, and the other principles outlined in the opinion of the court below (R. 105-106), it can hardly be doubted that the Board has the discretionary authority to assert less than the full measure of its legal jurisdiction. This

* *Hollow Tree Lumber Company*, 91 N.L.R.B. No. 113.

Court so recognized in *National Labor Relations Board* v. *Denver Building and Construction Trades Council,* 341 U. S. 675, wherein it stated (at 684): "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes *properly* declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case" (italics added). Accord: *Haleston Drug Stores, Inc.* v. *National Labor Relations Board,* 187 F. 2d 418 (C. A. 9), certiorari denied October 8, 1951.

It is equally apparent that the Board is not required to exercise this discretionary authority on an *ad hoc* basis, but may formulate standards which define in advance how this discretion will be exercised. The "choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities & Exchange Commission* v. *Chenery Corp.,* 332 U. S. 194, 203. This Court appears to have recognized the propriety of the Board's jurisdictional standards, for, in the *Denver* case, after declaring that the Board "sometimes properly declines" jurisdiction, it observed that the Board's current practice in this regard was embodied in the mimeographed release of October 6, 1950 (*infra,* pp. 15-24), which enunciated the very standards which petitioner now assails. 341 U. S., at 685, n. 14. See also *Bus Employees* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, 392, n. 14.

Petitioner's contention that assuming some standards may be proper, nevertheless no quantitative tests may be used (Pet. 22-28), rests on the erroneous assumption that quantitative tests of general applicability are *always* irrelevant to the determination of any question relating to jurisdiction. But the cases on which petitioner relies do not support this conclusion. They deal only with the *legal* limits of the Board's jurisdiction, and not with the Board's discretion to assert less than its full jurisdiction. The holdings that the reach of the Act does not "depend on any particular volume of commerce affected," but "upon the facts and circumstances of each case," bear only on the question whether the Board may, if it chooses, assert jurisdiction. Clearly, those holdings do not imply that in framing a discretionary policy designed to limit the exercise of its jurisdiction the Board may not rationally differentiate between businesses on the basis of their impact on commerce, and measure such effect quantitatively.[5]

2. Petitioner's contention (Pet. 9-10, 37-47)

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[5] There is thus no conflict between the decision of the court below and that of *National Labor Relations Board* v. *Joseph Stremel d/b/a Crow Bar Coal Co.*, 141 F. 2d 317 (C. A. 10) (Pet. 8, 27-28). This case merely holds that a coal company, whose size and operations appear similar to that of Rawalt here, is subject to the Act as a matter of law. The Board, consistent with this holding, found that it had jurisdiction over Rawalt as a matter of law, but then went on to conclude that, as a matter of policy, it would not exercise this power (R. 92-93). The *Stremel* case neither involves, nor is its holding inconsistent with, the Board's discretionary authority to decline jurisdiction.

that the jurisdictional standard was applied retroactively—and consequently unlawfully—likewise presents no substantial question warranting review by this Court. As the court below correctly concluded, there was no retroactive application here because the rule applied was enunciated in another case "before petitioner had filed its exceptions" to the examiner's report in the instant case "and thus necessarily prior to the Board's decision" herein (R. 107-108).[6]

Moreover, even if what occurred here could be called retroactive application of the standard, it would not have been improper. Cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 202-203. Unlike the cases cited by petitioner (Pet. 41-42), retroactive application in this case would not have impinged on "substantive" rights, for, since it is well settled that the Act does not create "private" rights, petitioner—as the court below noted (R. 108)—"had no legally cognizable right in any particular Board jurisdictional policy."

CONCLUSION

The decision below is clearly correct, and pre-

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[6] *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76 (C. A. 5), relied on by petitioner (Pet. 39-40), is inapplicable, for, as the court below pointed out (R. 108): "There the Board, by the time the jurisdictional policy was announced, had not only entered a final decision, but it had also relinquished jurisdiction over the case as a result of petitioning for enforcement under § 10 of the Act."

sents no substantial question warranting review. No conflict of decisions is shown. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1951.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141 *et seq.*), are as follows:

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such

agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means

of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be com-

puted from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

* * * * *

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

Release for morning papers (R-342)
Friday, October 6, 1950

N. L. R. B. CLARIFIES AND DEFINES AREAS IN WHICH IT WILL AND WILL NOT EXERCISE JURISDICTION

The National Labor Relations Board today announces the establishment of standards which will

govern its exercise of jurisdiction under the Taft-Hartley Act.

The various "yardsticks" which will be used by the Board in future cases involving all enterprises were set forth in eight unanimous decisions issued simultaneously. Pointing out that these standards "reflect, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues issues," the Board said:

> The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.
>
> The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should, in our opinion, be maintained.

The Board thereby reiterated its policy of not exercising jurisdiction, despite its power to do so, over business operations so local in character that a labor dispute would be unlikely to "have a sufficient impact upon interstate commerce to justify an already burdened Federal Board in expending time, energy and public funds."

The plan that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate

commerce clause of the Constitution, the Board will exercise jurisdiction over:

1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems).

2. Public utility and transit systems.

3. Establishments which operate as integral parts of a multistate enterprise (for example, chain stores, and branch divisions of national or interstate organizations).

4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year.

5. Enterprises which furnish services or materials necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year.

6. Any other enterprise which has:

(a) a direct inflow of material valued at $500,000 a year; or

(b) an indirect inflow of material valued at $1,000,000 a year; or

(c) a combination inflow ... outflow of goods which add up to at least a total of "100%" of the amounts required in items 4, 5, 6 (a) and (b) above.

7. Establishments substantially affecting national defense.

Following are summaries of the eight decisions in which the above policies were enunciated:

1. WBSR, Inc., a radio station in Pensacola, Florida, which is affiliated with the American

Broadcasting company's national network. Asserting jurisdiction over this company and ordering an election among its technical employees, the Board stated:

> Having recently reexamined Board policy covering the exercise of jurisdiction, we hereby reaffirm the Board policy of asserting jurisdiction over instrumentalities and channels of interstate and foreign commerce such as this radio station.

2. W. C. King, doing business as Local Transit Lines, Knoxville, Tenn., is engaged in the business of hauling passengers by bus between Knoxville and various other points within the State, transporting more than 550 passengers each day between Knoxville and Oak Ridge, the site of the atomic energy plants. Asserting jurisdiction over this company and ordering an election among its drivers and mechanics, the Board stated:

> Our experience has shown that public utilities, including public transit systems of the type here involved, have such an important impact on commerce as to warrant our taking jurisdiction over all cases involving such enterprises, where they are engaged in commerce or in operations affecting commerce, subject only to the rule of *de minimis*. Accordingly, we will assert jurisdiction in this case and will hereafter assert jurisdiction in all other cases involving public utilities and public transit systems of the type here involved, subject only to the foregoing limitation.

3. The Borden Company, Southern Division, involved the Houston, Texas, plant of the dairy com-

pany which processes and distributes milk and milk products throughout the United States. Asserting jurisdiction over this company, and ordering an election among the production and service employees at the Houston plant, the Board stated:

> Having recently reexamined Board policy covering the exercise of jurisdiction, we continue to believe that when a plant is owned and operated by a company which is a multi-state enterprise, we should exercise our discretion in favor of taking jurisdiction, even though management is entrusted to local officials and the particular plant may sell its entire product within the state where it is located.

4. Stanislaus Implement and Hardware Co., Ltd., Modesto, Calif., is engaged in the retail sale, fabrication and repair of hardware, machinery and farm implements. During 1949, its overall purchases amounted to $600,000. Of these, purchases from International Harvester Co. of tractors manufactured in Illinois amounted to $426,000, and from Fairbanks-Morse & Co. of pumps manufactured in Wisconsin, amounted to $24,000. Its sales during 1949 were approximately $1,300,000, of which approximately $26,000 consisted of shipments made to points outside the State. Asserting jurisdiction over this company and ordering an election among its employees in the tractor, welding and pump shops, the Board stated:

> Without considering the amount and character of the inflow, we further find, in view of the fact that the Employer's annual shipment of goods to points outside the State amounted

in value to more than $25,000, that it will effectuate the policies of the Act for this Board to assert jurisdiction. In future cases we will exercise jurisdiction over employers which annually ship goods valued at $25,000 or more out of a State.

5. Hollow Tree Lumber Company, Ukiah, Calif., is engaged in the business of logging and processing lumber within the State of California. During the fiscal year ending June 30, 1950, the company sales totaled $686,346.85, and were made to companies engaged in business within the State of California. The company's sales to its principal customer, Rockport Redwood Co., amounted to approximately $450,000. In the same year, Rockport's sales of lumber which were shipped outside the State of California amounted to approximately $220,000. Asserting jurisdiction over the Hollow Tree Lumber Co. and ordering an election among the production and maintenance employees at its sawmill, the Board stated:

> The Board has determined that it will exercise jurisdiction over those enterprises which affect commerce by virtue of the fact that they furnish goods or services necessary to the operations of *other* employers engaged in commerce, without regard to other factors, where such goods or services are valued at $50,000 per annum or more, and are sold to: (a) public utilities or transit systems; (b) companies which function as instrumentalities and channels of interstate and foreign commerce and their essential links; or (c) enterprises engaged in producing or handling goods destined for out-of-State shipment, or performing

services outside the State, in the value of $25,000 per annum or more. This standard reflects, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues.

In this proceeding, although the Employer ships no goods directly outside the State of California, it does deliver necessary goods valued in excess of $50,000 per annum to Rockport Redwood Company, which in turn produces goods valued to excess of $25,000 which are destined for out-of-State shipment. Having found that Hollow Tree Lumber Company is engaged in commerce within the meaning of the National Labor Relations Act, we will, pursuant to the policy enunciated above, exercise jurisdiction herein.

6a. Federal Dairy, Inc., Providence, R. I., is engaged in the processing, sale, and distribution of milk and milk products. All of its sales were made within the State of Rhode Island. During the past year approximately $400,000 of its equipment and supplies were secured directly from sources outside the State of Rhode Island. In declining to assert jurisdiction over this company, the Board stated:

The Board has decided not to assert jurisdiction in this case. This is an essentially local operation, which affects commerce only by way of direct inflow. In the past, we have concluded that, in cases of this kind, an interruption of such inflow by a labor dispute—though the volume of out-of-State purchases be substantial—would not be likely to have a sufficient impact upon interstate commerce to

> justify an already burdened Federal Board in expending time, energy, and public funds. In the light of more than 3 years' experience under the amended Act and the Board's current budget and case load, we now conclude that, although it would effectuate the policies of the statute to assert jurisdiction in cases of this kind where the direct inflow is substantial, due regard for these factors requires that we continue to decline jurisdiction where the direct inflow is less than $500,000 in value annually. Because the Employer's direct inflow is below the minimum standard that the Board has adopted for cases in which that factor is determinative, we shall not assert jurisdiction in this case. Accordingly, we shall dismiss the petition herein.

6b. Dorn's House of Miracles, Inc., Los Angeles, Calif., sells at retail television sets, radios, refrigerators and other household appliances. During 1949, the company's total purchases of merchandise amounted to more than $2.000,000 of which $1,707,000 represented the value of materials shipped from points outside the State to local distributors and resold by them to Dorn's. Asserting jurisdiction over this company and ordering an election among warehouse employees, the Board stated:

> In the past, the Board has in some cases refused to assert jurisdiction over certain retail enterprises where the sole basis for doing so would be inflow. After full reexamination and consideration, we have concluded that a labor dispute at an establishment having an indirect

> inflow of as much as $1,000,000 annually would tend to have such a substantial effect upon interstate commerce, as to warrant our assertion of jurisdiction on that basis alone in order to effectuate the policies of the Act. Hereafter, in the interest of certainty, regardless of the nature of the enterprise, where the indirect inflow totals at least $1,000,000 annually, we shall treat that factor alone as a sufficient basis for asserting jurisdiction.

6c. The Rutledge Paper Products, Inc., Mentor, Ohio, manufactures paper cups, plates, and napkins. During the year ending June 30, 1950, the employer purchased materials valued at $73,130.51, of which materials valued at $65,978.04 were shipped to it directly from points outside the State of Ohio. During the same period, the company's sales were valued at $29,143.24, of which products valued at $22,596.99 were shipped directly to points outside the State. Asserting jurisdiction over this company and ordering an election among its production and maintenance employees, the Board stated:

> It is true that the value of the annual shipments made by the Employer directly to points outside the State of Ohio is less than $25,000, and that the value of materials annually shipped directly to the Employer through interstate channels is less than $500,000—alternative minimum requirements established by the Board as standards to determine whether jurisdiction should be exercised on the basis of inflow or outflow. However, the Employer's inflow and outflow of materials, when consid-

ered in ratio to the respective minimum inflow and outflow requirements, are *together* equivalent to the minimum requirement in either category. The Employer's direct outflow figure of $22,596.99 is approximately 90 percent of minimum direct outflow requirement of $25,000. The $65,978.04 direct inflow figure of the Employer is approximately 15 percent of the minimum direct inflow requirement of $500,000. The total of the two percentages is thus in excess of "100 percent." Thus viewed, interference by a labor dispute with this Employer's interstate business would, in our opinion, exert an impact upon commerce as great as would be exerted in the case of companies having interstate shipments of the value of either of the minimum yardstick figures alluded to above. We find not only that the employer is engaged in commerce within the meaning of the Act, but that this Board should exercise jurisdiction herein.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 306

LOCAL UNION NO. 12, PROGRESSIVE MINE WORKERS OF AMERICA, DISTRICT 1,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, AND RAWALT COAL COMPANY, A CORPORATION,
Respondents.

REPLY BRIEF OF PETITIONER TO THE BRIEF OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Local Union No. 12, Progressive Mine Workers of America, District No. 1, by A. M. Fitzgerald and G. W. Horsley, its attorneys, respectfully submits to this Honorable Court this brief in reply to the brief filed by the National Labor Relations Board in opposition to its petition for certiorari.

The Petitioner respectfully submits this reply brief for

the purpose of calling the attention of this Honorable Court to certain statements made in Respondent's statement of the case and to explain more fully the cases cited by the Respondent to sustain its position in this case.

In its statement of the case on pg. 4 of the Respondent's brief, it was admitted that the trial examiner in his intermediate report of August 31, 1951 found that the Rawalt Company was engaged in commerce within the meaning of the NLRA and that the Board as a matter of law had jurisdiction of the case (Record R 65).

He then proceeded to decide the case on its merits and found certain unfair labor practices as having been committed, such practices not being pertinent here. The Board further conceded that in dismissing the complaint on November 14, 1950, it found that the Company's operations affected commerce within the meaning of the Act and was thus subject to the jurisdiction of the Board; but that since, as a matter of policy, it had, since the issuance of the intermediate report in this case, adopted certain minimum requirements for the assertion of jurisdiction, it was necessary for it to examine the jurisdictional facts to determine whether these minimum requirements had been met. Examining the case in this light, the Board stated (R 93):

> "* * * As all (the Company's) coal was sold locally and the value of its sales to interstate firms over which we would assert jurisdiction was less than $50,000, we find, in accord with our announced policy, * that it would not effectuate the policies of the Act to assert jurisdiction in this case. We shall, therefore, dismiss the complaint in its entirety."

Thus, in summary, the Board found that although the Company's operations were such that the Board had juris-

diction as a matter of law, the Board did not assert jurisdiction in this case, simply because the Rawalt Company had not met the standard which the Board had adopted in the *Hollow Tree Lumber Co.* case, 91 NLRB 635. The dismissal was asked because of the jurisdictional policy which the Board had set up after the hearing by the trial examiner. Such is the basis of the Board's action as conceded in the Respondent's statement of the case.

In Respondent's argument, it made the following statement:

> "The holding of the court below that the Board has power to promulgate criteria for the purpose of limiting the exercise of its vast legal jurisdiction, and to govern its action in particular cases according to these standards, is clearly correct . . . "

We have searched in vain the four corners of the opinion of the Circuit Court of Appeals in this case and find no statement whereby the court made a decision on this question other than by implication. Specifically, the court did not say that the Board had been given the power to set up minimum jurisdictional standards by any statutory provisions of the NLRA; nor, did it state such power should be implied by the provisions of the Act. The court's entire argument on this point is based on a case in which the jurisdictional question was decided by examination of the particular facts involved, a procedure which we feel that the Board has the power to follow, as given by the Act, but there is no authority cited, either statutory or case law, which has declared that the Board has the power to set up these minimum standards.

The court below, and the Respondent as well, relied on the case of *Haleston Drug Stores, Inc. v. National Labor Relations Board,* 187 F. 2d 418 (CA 9),certiorari denied

October 8, 1951. That case, however, presented an entirely different problem than the one we are raising. In that case the position of the petitioners was that Congress had evidenced an intent by creating the General Counsel's office with provisions governing its duties to take away the jurisdiction of the NLRB to dismiss a case on policy grounds once the General Counsel had issued a complaint. We have consistently agreed that the Board does have that discretion, if its decision is based on the totality of facts in each case. Again, in the Haleston case, there was no discussion of the power of the Board to adopt minimum jurisdictional standards. In the opinion of the court and in the brief of the petitioner in that case, the primary concern of all parties was to define the scope of the powers and duties of the General Counsel. Therefore, it can hardly be cited as an authority sustaining the position of the Respondent.

The most obvious conclusion which can be drawn from the cases in the Respondent's brief is that none of them has decided the question which the Petitioner has raised in this proceeding. Nowhere in any of the cases which the Respondent has cited was the question of the adoption of these standards raised, nor were they discussed by the court except in some offhand statements, but not in answer to any issues raised. For instance, the case of *NLRB v. Denver Building & Construction Trades Council* 341 U. S. 675; 71 Supreme Court 943, was a case which involved a question of alleged secondary boycott in regard to the construction of a building. The facts of the case are not pertinent to this proceeding, but some observation might be made of the court's discussion of the jurisdictional phase of the case. That case was decided on June

4, 1951 as a result of the granting of the petition for certiorari to the Court of Appeals for the District of Columbia on its decision of September 1, 1950, 186 Fed. 2d 326. The particular decision of the Board is found in 82 NLRB 1195. From the dates involved and more clearly from the statement of the case in this court, no question of these minimum jurisdictional standards, which were adopted October 3rd and released to the press on October 6th, 1950, was involved. The fact is, the Court expressly relied on the case of *NLRB v. Fainblatt,* 306 U. S. 601, in which case the court said:

> "Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which Courts would apply the maxim de minimis."

This court went on then to say in the Denver Building case:

> "The maxim de minimis non curat lex does not require the Board to refuse to take jurisdiction of the instant case."

Consequently, it is obvious that this court decided that case on the basis of all the jurisdictional facts which are not relevant for repetition here. The only place wherein the court mentioned the present jurisdictional policy of the Board was in footnote 14 of the opinion. There the court quoted from the case of *Polish National Alliance v. NLRB,* 322 U. S. 643, in which the court said, among other things, that "Congress left it to the Board to ascertain whether prescribed practices would, in particular situations, adversely affect commerce when judged by the full reach of

the constitutional power of Congress," and, at the end of the quotation the court said this:

> "For the current practices see Mimeograph Release of NLRB dated October 6, 1950, entitled 'NLRB Clarifies and Defines Areas in Which It Will and Will Not Exercise Jurisdiction.' See also, Hotel Assn. of St. Louis, 92 NLRB —, 27 LRRM 1243."

Upon this slim reference, the Respondent seems to assert in its brief on page 8 that this court evidences its approval of the Board's minimum jurisdictional standards. They contend this in spite of the first line of this quotation in which the court said, "for the current practices see" etc. It was obviously no more than a reference to what the Board was doing now, and it is certainly well established that this court makes no decision on a point that is not clearly and concisely raised and necessary for a decision of the case before it. Obviously, this entire case arose before these standards were even adopted and this case cannot be cited as an authority for saying that this court has approved the adoption of these standards. Such a decision was not made as it was in no way necessary to the decision of the Denver Building case.

Respondent also cited another case in which it believed this court has evidenced its approval of these standards, which case was *Bus Employees v. Wisconsin Employment Relations Board,* 340 U. S. 383, the specific reference being to Note 14 on page 392. This case involved a question of constitutionality of the Wisconsin Public Utility Anti-Strike Law and was decided on February 26, 1951. The statute provided for mandatory arbitration when an impasse was reached in collective bargaining with workers of certain public utilities. The decision of the arbitrators was final as to both employer and employees subject to

judicial review, and the utility workers were denied the right to strike. The court felt that this Act was invalid, because, as was stated in the case of *Automobile Workers v. O'Brien*, 339 U. S. 454, the provisions of the NLRA as amended could not be read as permitting concurrent state regulation of peaceful strikes for higher wages; that Congress had occupied this field and closed it to state regulation. An attempt was made to distinguish the Bus Employees case from the O'Brien case in that in the latter a national manufacturing organization, rather than a local public utility, was the one to which Michigan had applied its notice and strike vote provisions and that, therefore, this public utility would not be subject to the provisions of the Federal Labor Law. The court reviewed the case law on the subject, which held that Congress did have the power to regulate this local public utility which was entirely within a single state, and the court furthermore made this observation:

> "No distinction between Public Utilities and national manufacturing organizations has been drawn in the administration of the Federal Act."

In a footnote to this later statement is the only place where the court discussed the minimum standards involved in this case. In that footnote, No. 14, the court said:

> "In a recent statement of policy, the NLRB declared that, in view of the important impact on commerce, jurisdiction will be exercised in all cases involving the type of public utilities before us in these cases. Local Transit Lines, 91 NLRB 623; 26 LRR Man. 1547 (1950)."

Again these minimum standards were not directly involved. In fact, the case could have been decided the way it was without any reference to these minimum standards. In fact, this statement seems to have been added to bolster the above statement of the court after the court had re-

ferred to a public utility case in the footnote, which case was decided on the old case to case method as far as the assertion of jurisdiction. The court was merely referring to the pattern of conduct of the NLRB in assuming that these utilities were subject to Federal Labor Law and therefore, taking jurisdiction throughout its history as the facts in each particular case justified. The mention of the recent standards was merely to show that the Board was not deviating from its former practice in holding that the Federal NLRB had jurisdiction in these cases under the commerce clause. The final case relied upon by the Respondent was the case of *Securities and Exchange Commission v. Chenery Corp.*, 332 U. S. 194. That case had absolutely nothing to do with labor law and no reference nor mention of these minimum jurisdictional standards was made in the opinion. It is true that the court did make the statement relied on by the Respondent on page 8 of his brief, but the court further said:

> "The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern. See Board of Trade v. U. S., 314 U. S. 534, 548. Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent *with the authority granted by Congress.* See National Broadcasting Co. v. U. S., 319 U. S. 190, 224. We are unable to say in this case that the Commission erred in reaching the result it did. The facts being undisputed, we are free to disturb the Commission's conclusion only if it lacks any *rational and statutory* foundation." (Italics ours.)

It is quite apparent from the opinion of this court that the rule adopted by the Commission was upheld by virtue of authority granted to the Commission by Congress. We

respectfully submit that the NLRA does not give such authority to the Labor Board, to arbitrarily set minimum standards and to arbitrarily make rules and regulations which are retroactive. We tried to get the Circuit Court of Appeals to decide this issue, but that court "ducked" the issue and we are now relying upon this court to settle this issue for the first time.

The above case is further relied on by the Respondent on page 10 of his brief, to the effect that if what has occurred in this case could be called retroactive application of the standard, it would not have been improper. The court in its opinion did not give such a broad approval of retroactive action by an administrative agency, but said that such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. The court said:

> "If that mischief is greater than the ill effects of the retroactive application of a new standard it is not the type of retroactivity which is condemned by law."

Applying this test, there does not seem to be any reason why it was necessary for the Board to apply this standard to a case which had already been heard by the trial examiner; a case in fact, wherein both the government and the parties had gone to the expense of conducting an entire hearing on the merits. Certainly, it would seem that the necessity would have to be great to justify such wasting of time and effort on the part of both the agency and parties.

We have no argument with the Respondent's discussion of the case of *NLRB v. Joseph Streme d/b/a Crow Bar Coal Company*, 141 Fed. 2d 317, which was discussed in a footnote on page 9 of its brief. Little needs to be added, ex-

cept that if the jurisdictional problem was to be solved in this case on a case to case basis, and if the Board was to follow consistently its former policy, it would have taken jurisdiction of the Respondent, Rawalt Coal Company.

In the conclusion of the Respondent's brief it was stated that there was no conflict of decisions here and no substantial question warranting review. The reason why there is no conflict in decisions is that there are no decisions squarely deciding this point. The only case in which it has been directly raised is the instant case. Furthermore, the Supreme Court has never decided the question. What more important question of Federal Law in the field of labor relations could there be than the very question raised here as to the extent and scope of the jurisdiction of the NLRB and its policy in regard to it? Our whole position can be resolved in a few words. We feel that Congress did not intend the Board to have the power to set up these standards without some specific statutory language granting such power. Furthermore, we feel that the Board should not be allowed to dismiss a proceeding by changing its jurisdictional policy after a full hearing has been had by the trial examiner and all evidence in regard to the jurisdictional question has been taken. Such a procedure, we feel, was not anticipated by Congress and neither the procedure nor the adoption of these standards was within the power of the National Labor Relations Board.

In conclusion, we cannot help but ask this simple question. Is the National Labor Relations Act purely and simply an act for the protection of the public in general, or, does it also involve the rights of the working men in industries which involve interstate commerce?

We cannot help but believe that Congress intended this act to answer both of these questions in the affirmative.

Labor calls this Act, "a slave labor law" and management calls it, "a Bill of Rights for labor." Here, we have working men being denied any rights because of an arbitrary ruling by the Labor Board that although the business in which they are working affects interstate commerce, its dollar volume does not measure up to a certain minimum standard. We respectfully ask this court to resolve this question and to hold that it is the duty of the Labor Board under each individual case to consider the impact of that particular industry upon interstate commerce, based upon the evidence in that case rather than an artificial minimum standard.

We again call to the court's attention the matter raised in our original brief, that the decision in this case is also important because a labor union must negotiate contracts on an industry wide basis and to anticipate dollar volume of business in one locality as compared to another will so complicate labor negotiations as to place a tremendous burden upon interstate commerce and render it impossible for a labor organization to effectively function in the representation of its membership and to fulfill its duties to the public.

It is respectfully submitted that the petition for certiorari in this matter should be allowed and this question put to rest once and for all.

Respectfully submitted,

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